fixed for hearing about 5 months previously and suddenly on the date of hearing a telegram was received stating not only that counsel was unable to obtain a seat in the plane but also the defendant suddenly fell sick. One should also consider the difficult position of the courts in circumstances such as the present case. Here the learned judge has also stated that although he had entered judgment in default it would still be open for the appellant to apply to the court to set aside the order upon giving valid reasons. Unfortunately no such application was ever made to the learned judge.

Looking at the facts of this case we did not consider it proper to interfere with the order made by the learned judge and therefore dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Ngan & Tan; A. Gomez & Co.*

TENGKU AZMI BIN TENGKU YUSOFF & ANOR. v. TENGKU AHMAD BIN TENGKU ABDUL GHAFFAR & ORS.

[F.C. (Wan Suleiman Ag. C.J. (Malaya), Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & September 17, 1981]

[Kota Bahru — Federal Court Civil Appeal No. 89 of 1980]

Practice and Procedure — Res Judicata — Application to set aside sale by private treaty — Application dismissed — No appeal — Objection to confirmation of sale.

In this case by a consent order it had been ordered that all the immovable properties of Tengku Mariam bte. Tengku Ahmad be sold by private treaty among the beneficiaries of the estate at prices not less than the valuation prices. The respondents were successful in the bid for all the properties except two pieces of land. The appellants filed a summons in chambers to have the order set aside on the ground that (a) no attempt was made to call the beneficiaries for any meeting or negotiations for a private treaty and (b) there was no public tender for the sale of the properties. This application was dismissed by the learned Judge. An appeal was lodged by the appellants but this was withdrawn.

Subsequently the respondents applied for the confirmation of the sale. The appellants objected on the grounds that (a) no attempt was made to call the beneficiaries to any meeting or negotiation for a private treaty and (b) no valuation report was enclosed in the affidavit. The learned Judge allowed the application of the respondents. The appellants appealed.

Held, dismissing the appeal: the learned Judge was correct in holding that the plea of *res judicata* raised by the respondents should succeed.

Case referred to:-

(1) *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459.

Cases cited: *Chung Guat Hooi* v. *G.H. Goh* [1954] M.L.J. 131; *Lee Sem Yoong* v. *Leong Yoong* [1967] 2 M.L.J. 86; *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.* [1962] M.L.J. 15.

FEDERAL COURT.

A. Gomez for the appellants.

Foo Say Ghee for 1st respondent in personal capacity.

Ang Kiang Leng for 1st respondent as administrator.

Aria Ratnam for the Official Administrator.

Cur. Adv. Vult.

Wan Suleiman Ag. C.J. (Malaya) (delivering the judgment of the Court): By a consent order made on December 4, 1978 the learned judge ordered that all immovable properties of Tengku Meriam bt. Tengku Ahmad, deceased as set out in the order be sold by private treaty among the beneficiaries of her estate and also among the beneficiaries of the estate of Tengku Som bt. Sultan Ahmad, deceased including the beneficiaries of the estate of Che Bidah bt. Abdul Rahman, deceased, at prices not less than "the present valuation to be given by the Director of Valuation, Kelantan or the valuation given by Asian Appraisal (Malaysia) Sdn. Bhd. in 1977 whichever are greater", and if this is not successful

(ii) by public tender at the prices not less than the prices abovementioned and if this is not successful

(iii) then by public auction at prices not less than the reserve prices to be fixed by the court.

A notice Tawaran (private tender) dated July 28, 1979 was then issued by the S.A.R. closing originally on August 29, 1979 and later altered to September 2, 1979, the conditions of tender being set out in the Surat Tawaran (at pages 65 and 66 of the appeal record). It gave a list of the properties and the reserve prices determined in the manner set out in the consent order, and was sent under sealed cover to each of the beneficiaries, inviting any beneficiary who wished to tender to do so at a price not less than the reserved price stated in the notice tawaran, and to accompany each tender with a cheque to the amount of 10% of the sum tendered.

Tengku Ahmad bin Tengku Abdul Ghaffar, Tengku Amri bin Tengku Yusoff, Tengku Mohamed bin Tengku Yusoff and Tengku Juhan Ariffin bin Tengku Yusoff tendered. Tengku Ahmad bin Tengku Abdul Ghaffar was successful in the bid for all the properties except for 2 pieces of land. The latter went to Tengku Juhan Ariffin. The present appellants failed to tender. The Assistant Official Administrator, Kelantan as representative of the estate of Tengku Som bte. Sultan Ahmad did not tender but agreed to the procedure adopted.

The appellant filed a summons-in-chambers on September 27, 1979 to have the order set aside on the grounds that: —

(1) No attempt was made to call the beneficiaries for any meeting and/or negotiations for a private treaty.

(2) There was no public tender for the sale of the said properties.

This application to set aside was dismissed by the learned judge for the reasons set out in his grounds, the substance of which is that since there is no set procedure as to how sale by private treaty is to be conducted, it is not incumbent on the S.A.R. to call for a meeting of the beneficiaries for the purpose of negotiating the sale of the various items of property. The learned judge considered that the manner in which the present sale by private tender had been conducted amounts, in effect, to a sale by private treaty.

Against this dismissal the appellants appealed.

Before us and the court below Mr. Gomez for the appellants said that this notice of appeal was subsequently withdrawn because he had failed to serve it in time and secondly he thought that the objection then was premature as the parties did not come to a private treaty.

On October 5, 1979 Tengku Ahmad as administrator agreed to sign an agreement with himself in his personal capacity agreeing to convey and transfer the properties he successfully tendered for to himself in that latter capacity. A similar agreement was entered into between Tengku Ahmad and Tengku Juhan Ariffin in respect of the two pieces of land the latter had successfully tendered for.

An application by way of summons-in-chambers by the appellants for stay was dismissed on January 20, 1980.

On February 7, 1980 Tengku Ahmad applied for the sale of the properties which he and Tengku Juhan Ariffin had successfully tendered for to be confirmed by the court. The appellants filed an affidavit objecting, the grounds being:

"(i) No attempt was made to call us and/or the other beneficiaries for any meeting or negotiation for a private treaty.

(ii) No valuation report given by the Director of Valuation, Kelantan or the valuation given by Asian Appraisal (Malaysia) Sdn. Bhd. are enclosed in the same affidavit of Tengku Ahmad."

The learned judge allowed the application of Tengku Ahmad made in his summons-in-chambers dated February 7, 1980 and the appellants now appeal to us.

The grounds of appeal may be summarised thus:

(1) The sale by private treaty was bad in law.

(2) The judge erred in holding that the matter was *res judicata.*

Learned counsel for the appellants when dealing with ground one submitted that "private treaty" which it will appear has never been legally defined should be given the common dictionary meaning. Before us as he had done before the learned judge, he argues that private treaty requires consensus, that there should be negotiations by parties who should come together and bargain and only thereafter come to an agreement. In bargaining he says, each person would know what the others are prepared to pay. Private tender, he asserts, is not the same thing and is done in secrecy. He cited the case of *Cundy* v. *Lindsay*[1] for the proposition that there was no consensus of mind which could lead to any agreement.

Referring to the valuation report the other complaint is that prices prevailing in January 1977 would be substantially different from those prevailing in December 1979, the date of confirmation of the sale.

As no evidence was advanced to support this contention, and also because we should perhaps take judicial notice of the fact that real property in Kelantan is not subject to rapid increases in value because they must be sold within a restricted market, we can safely disregard this argument.

In his reasons for dismissing appellants' application to set aside the sale, the learned judge dealt at some length on the reason why he regarded the procedure followed as being equivalent to a private treaty, and that neither appellant had been prejudiced in any way. He also remarked that no bid higher than those offered by the successful tenderers had ever been made by any of the other beneficiaries since the closing of the tender.

As his Lordship said in another part of his judgment, he had considered the following facts:

(a) that the sale prices were not less than the valuation made by the Director of Valuation, Kelantan;

(b) that the appellants had themselves failed to tender;

(c) it was no secret in the sense that the beneficiaries are prohibited from discussing among tnemselves as to the values;

(d) the appellants did not file objection before the closing of the date of tender i.e. September 2 but did so well after;

(e) no higher bid was ever made.

We are inclined to agree with the learned judge that even if the procedure adopted in effecting the sale was erroneous, the result was correct, just and expeditious. After all, the identity of the other potential bidders are known, and there was nothing to prevent the appellants from approaching the others, who are by no means numerous to find out what each was bidding. Even if each maintained strict secrecy, the net result will be to the advantage of all, because to succeed each would have to outbid the others, and the eventual total sum available for distribution would thus be maximised. It appears to us to be a reasonable way of conducting a sale by private treaty, and we fail to see how the appellants can claim that their interests have been prejudiced.

The other ground on which the learned judge based his decision to allow respondents' application for confirmation of the sale of the properties and of the estate is that the present grounds of objection to the application were the very grounds advanced in their summons-in-chambers of January 1, 1980 to set aside the sale by private tender. The dismissal of that summons-in-chambers having been withdrawn, the matter, he held, is *res judicata.*

In summons-in-chambers of January 1, 1980, the grounds advanced by appellants to set aside the sale were:

(i) No attempt had been made to call appellants and/or the other beneficiaries for any meeting and/or negotiations for a private treaty.

(ii) There was no public tender for the sale of the said properties.

In objecting to respondents' application in statement of claim dated February 20, 1980 for confirmation of the sale etc. the grounds were that

(a) No attempt had been made to call appellants and/or the other beneficiaries for any meeting and/or negotiations for a private treaty; and

(b) No valuation report was given by the Director of Valuation, Kelantan, or the valuation given by

Asian Appraisal (Malaysia) Sdn. Bhd. were enclosed in the affidavit of the respondents supporting the application in the statement of claim latter mentioned.

We agree with the learned judge that the substance of the objection is the ground first mentioned in both instances i.e. the sale by private tender as conducted by the S.A.R. was not in accord with the consent order which called for sale by private treaty as the first choice.

At page 371 of the Second Edition of that admirable treatise on Res Judicata by *Spencer-Bower & Turner* appears the following passage:

"For the purpose of estoppel *per rem judicatam*, . . . , the judicial decision relied upon as creating the estoppel must be shown to have been final in both the senses there indicated: that is to say, there is no estoppel if the judicial decision, as recorded, is imperfect, provisional, indefinite, or ambiguous, or if, though *ex facie* appearing to be final, it is liable, whether at common law, or by statute, to be rescinded, varied, or re-opened by the tribunal which pronounced it."

We are of the view that the decision of the learned judge in dismissing appellants' application to set aside the sale by private tender made by way of summons-in-chambers dated January 1, 1980 satisfies both these requirements of finality and would therefore with respect agree with the learned trial judge that the plea of *res judicata* raised by respondents should succeed.

We would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *A. Gomez & Co.; Foo Say Ghee & Co.; Dzaiddin & Co.*

CHE NOH BIN YACOB v. SENG HIN RUBBER (M) SDN. BHD.

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & September 17, 1981]

[Kota Bharu — Federal Court Civil Appeal No. 105 of 1980]

Labour Law — Social Security — Employee injured in a factory — Employee a contributor under Employees' Social Security Act, 1969 — Whether barred from receiving or recovering damages under Common Law or any other law — Employees Social Security Act, 1969, ss. 31 & 42.

The appellant claimed damages arising from an accident at a factory of the respondents while appellant was operating a machine. At the trial the respondents raised the preliminary point that section 31 of the Employees Social Security Act, 1969, was a bar to the appellant's claim. It was contended that a contributor under the said Act is barred from receiving or recovering any damages under the common law or any other law for the time being in force. The learned judge held that section 31 of the Act operates as a bar to the claims and he dismissed the claims (see [1980] 2 M.L.J. 264). The appellant appealed.

Held, dismissing the appeal: it is clear that once a person is an insured person under the Act, section 31 and section 42 of the Act constitute a complete bar to any claims against his employer under the common law.

Cases referred to:-

(1) *Tan Peng Loh* v. *Lee Aik Fong & Anor.* [1982] 1 M.L.J. 74.

(2) *Croxford* v. *Universal Insurance Co. Ltd.* [1936] 2 K.B. 253, 280.

FEDERAL COURT.

Wan Mustapha for the appellant.

P.C. Royan for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J. (delivering the judgment of the Court): The appellant's claims before the High Court were for damages arising from an accident on April 23, 1975 at a factory of the respondents while appellant was operating a machine which he alleged to be totally different from the one he had been used to work with. As a result of the accident he suffered certain injuries.

In the statement of claim the appellant (plaintiff before the High Court) alleged breach or breaches of respondents' statutory duties under the Factories and Machinery Act, 1967 and in the alternative alleged negligence or breach of duty on the part of the respondents as employer under the common law.

In their statement of defence the respondents (defendants before the High Court) denied breach of any duty or negligence and alternatively alleged contributory negligence on the part of the appellant.

Paragraph 6 of the statement of defence alternatively relied on section 31 of the Employees' Social Security Act, 1969 (hereinafter referred to as "the Act") contending that a contributor under the said Act is barred from receiving or recovering any damages under the common law or any other law for the time being in force. This is the crux of the appeal.

When the suit came up for hearing before the learned judge arguments were heard on the preliminary point whether section 31 of the Act is bar to the plaintiff's claim aforesaid. Before the argument both parties had apparently agreed that —

(a) the plaintiff was an insured person under section 2(2) of the Act;

(b) the machine and the factory came within the Factories Act; and finally

(c) the plaintiff had on October 10, 1977 been paid $1,935.42 as compensation under the Act.

By virtue of Gazette Notification P.U. (B) 385 dated August 15, 1973 certain provisions of the Act came into operation in the Social Security Area of Kota Bahru.

After hearing arguments on the preliminary point the learned judge held that section 31 of the Act operates as bar to the claims and therefore dismissed the claims with costs. The plaintiff now appeals.

The order of the learned judge dismissing the claims was made on April 12, 1980. Four days later, substantially the same question was raised before the High Court, Kuala Lumpur, in another civil suit (Civil Suit No. 1248 of 1973).[1] In the Kuala Lumpur case the plaintiff's claims for damages had been heard and the third party was found solely to be blamed for the accident. Damages special and general were agreed to at $120,000 and awarded against the 3rd and 4th defendants. The plaintiff there was an employee of the 4th defendant. The plaintiff's claims against the 1st and 2nd defendants were dismissed